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No. 90-792

Supreme Court, U.S.
FILED
JAN 22 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

LESLIE SALT CO. AND CARGILL, INC., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

ROBERT L. KLARQUIST
DAVID C. SHILTON
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether seasonal bodies of water that are not hydrologically connected with navigable waters, but which serve as habitat for migratory birds or endangered species, are "waters of the United States" within the meaning of Section 502(7) of the Clean Water Act, 33 U.S.C. 1362(7), and therefore subject to federal regulatory jurisdiction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 896 F.2d 354. The opinion of the district court (Pet. App. A15-A41) is reported at 700 F. Supp. 476.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1990. A petition for rehearing was denied on August 27, 1990. Pet. App. A42-A43. The petition for a writ of certiorari was filed on November 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Water Act (CWA) is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101(a), 33 U.S.C. 1251(a). One of the chief goals of the Act is the attainment of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." § 101(a)(2), 33 U.S.C. 1251(a)(2). Under Sections 301 and 502 of the Act, 33 U.S.C. 1311 and 1362, the discharge of dredged or fill materials into "navigable waters" —defined as the "waters of the United States"—is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to Section 404, 33 U.S.C. 1344. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985).

The Corps of Engineers first published regulations further defining "navigable waters" for purposes of the Section 404 permit program on April 3, 1974. 39 Fed. Reg. 12,115 (1974). Those regulations limited the Corps' assertion of jurisdiction under Section 404 to "waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. 209.120(d)(1) (1974). The Corps' initial interpretation of the scope of its jurisdiction under Section 404 met with substantial opposition. The Environmental Protection Agency (EPA) interpreted the CWA as a congressional assertion of significantly broader federal jurisdiction than would be encompassed by the traditional definition of "navigable waters." See *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works,*

94th Cong., 2d Sess. 349-351 (1976) (letter from Russell E. Train, Administrator of EPA, to Lt. Gen. W.C. Gribble, Jr., Chief of Corps of Engineers).[1] As the Corps later explained, its initial regulations raised concerns about the lack of protection for "isolated wetlands, and potholes whose degradation, destruction, and disappearance continues to increase at alarming rates." 42 Fed. Reg. 37,123-37,124 (1977). Several federal courts considering the coverage of adjacent wetlands agreed that the Corps had given Section 404 a more restrictive reading than was intended by Congress. See, *e.g.*, *United States* v. *Holland*, 373 F. Supp. 665, 670-676 (M.D. Fla. 1974).[2] In *NRDC, Inc.* v. *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), the court held that Congress, in the CWA, "asserted fed-

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[1] EPA administers the CWA except as otherwise explicitly provided. § 101(d), 33 U.S.C. 1251(d). The Attorney General has determined that the "ultimate administrative authority to determine the reach of the 'navigable waters' for the purposes of § 404" resides with EPA. 43 Op. Att'y Gen. No. 15, at 1 (Sept. 5, 1979). EPA has consistently supported a broad interpretation of the scope of CWA jurisdiction. Shortly after the Act was passed in 1972, EPA established a policy of preserving wetland ecosystems in the administration of its regulatory activities and grant programs. 38 Fed. Reg. 10,834 (1973). The agency took this action because "[t]he Nation's wetlands * * * are a unique, valuable, irreplaceable water resource," serving as "a habitat for important furbearing mammals, many species of fish, and waterfowl," and supporting "fishing, as well as wildfowl and other hunting." *Ibid.*

[2] Shortly after the *Holland* decision, the House Committee on Government Operations expressed the view that the Corps' narrow view of its jurisdiction under Section 404 did not comport with congressional intent. The Committee called upon the Corps to adopt the broader view taken by EPA and the court in *Holland*. H.R. Rep. No. 1396, 93d Cong., 2d Sess. 23-27 (1974).

eral jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term ['navigable waters'] is not limited to the traditional tests of navigability." The court ordered the Corps of Engineers to publish new regulations "clearly recognizing the full regulatory mandate of the Water Act." *Ibid.*

In response to the order in *NRDC, Inc.* v. *Callaway*, the Corps of Engineers promulgated interim final regulations providing for a phased-in expansion of its Section 404 jurisdiction. 40 Fed. Reg. 31,320 (1975); see 33 C.F.R. 209.120(d)(2) and (e)(2) (1976). The interim regulations revised the definition of "waters of the United States" to include, *inter alia*, waters that are not adjacent to navigable waters (sometimes referred to as "isolated waters"). 33 C.F.R. 209.120(d)(2)(*i*) (1976).[3] On July 19, 1977, the Corps published its final regulations, in which it revised the 1975 interim final regulations to clarify many of the definitional terms. 42 Fed. Reg. 37,122 (1977). The final regulations were substantially similar to the 1975 interim regulations and

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[3] Phase I, which was immediately effective, included coastal waters and traditional inland navigable waters and their adjacent wetlands. 40 Fed. Reg. 31,321, 31,324, 31,326 (1975). Phase II, which took effect on July 1, 1976, extended the Corps' jurisdiction to lakes and primary tributaries of Phase I waters, as well as wetlands adjacent to the lakes and primary tributaries. *Ibid.* Phase III, which took effect on July 1, 1977, extended the Corps' jurisdiction to all remaining areas encompassed by the regulations, including "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters." 40 Fed. Reg. 31,325. See also 42 Fed. Reg. 37,124 (1977) (describing the three phases).

explicitly included "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." 42 Fed. Reg. 37,144 (1977); see 33 C.F.R. 323.2(a)(5) (1978). The definition of "waters of the United States" promulgated in 1977 is substantially the same as the one in effect today. See 33 C.F.R. 328.3(a).[4]

2. a. Petitioner Leslie Salt Company (petitioner) owns approximately 153 acres south of San Francisco. The so-called Newark Coyote Property abuts the San Francisco Bay National Wildlife Refuge and lies near Newark Slough, a tidal arm of San Francisco Bay. Pet. App. A2. The property was used for salt production prior to 1959. The eastern part of the property contains pits formerly used to collect calcium chloride. The western portion contains large, shallow, water-tight basins formerly used for crystallizing salt. Both the pits and the former crystallizers fill with water during the rainy season, which comes in the winter and spring months. *Id.* at A2, A13. This seasonal ponding lasts long enough in some areas to permit small fish to live. *Id.* at A2-A3. Migratory birds, including water and shore birds such as ducks, egrets, plovers, avocets, willets, sandpipers and dowagers, use the water-filled crystallizers and pits for feeding,

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[4] The Corps' current definition of "waters of the United States" was amended in 1982 to make it identical to EPA's definition of the same phrase in 40 C.F.R. 230.3. See 47 Fed. Reg. 31,795 (1982). The two agencies now define "waters of the United States," and hence the scope of federal regulatory jurisdiction, in the same way for all programs under the Clean Water Act.

roosting and resting. *Id.* at A3; E.R. 104, 106.[5] In addition, an endangered species, the salt marsh harvest mouse, uses the property as habitat. Pet. App. A3. The southern part of the property contains at least nine acres of wetlands that are hydrologically connected with the waters of Newark Slough and are subject to tidal inundation. Pet. App. A3, A8. These adjacent wetlands are no longer at issue.

b. In late 1985, the Corps of Engineers learned that petitioner had begun discharging fill in connection with the construction of ditches and a siltation pond on the property. The Corps accordingly issued a cease and desist order pursuant to its authority under Section 404 of the CWA. The Corps asserted jurisdiction over some 110 acres of the Newark Coyote property. Rather than apply for a permit, petitioner filed suit, challenging the Corps' assertion of jurisdiction; the United States brought an enforcement action against petitioner, which was consolidated with petitioner's declaratory judgment action. Pet. App. A3-A4.[6]

After a trial, the district court ruled that the Corps had no jurisdiction over any part of petitioner's property. With respect to the areas containing the crystallizers and pits, at issue here, the court first concluded that they do not fall within the defi-

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[5] "E.R." refers to the excerpts of record filed in the court of appeals.

[6] As this Court noted in *Riverside Bayview Homes*, 474 U.S. at 127, 135 n.9, the Corps' assertion of jurisdiction over an area does not necessarily preclude development. The landowner must, however, apply for a permit, 33 C.F.R. Pt. 323, or show why his proposed development fits within one of the regional or nationwide general permits created by the Corps' regulations as a way of allowing certain activities to occur with little delay or paperwork. 33 C.F.R. Pt. 330.

nition of "wetlands" found in the Corps' regulations, 33 C.F.R. 328.3(b), because they are not saturated with a frequency and for a duration sufficient to support a prevalence of wetland vegetation. Pet. App. A33-A40. The district court next ruled that the same areas do not qualify as "other waters" under Section 328.3(a)(3) of the Corps' regulations because they had been artificially created and are "dry most of the year." Pet. App. A32. The court found it unnecessary to reach the question, presented here, of the Corps' authority over waters based on their use by migratory birds. *Id.* at A31-A32. The district court also held that the southern portion of the property, though containing wetland vegetation, does not qualify as wetlands because the wetness there purportedly stemmed from governmental actions. *Id.* at A36-A37.

c. The United States appealed on all issues except whether the crystallizers and pits, in addition to being "other waters" under 33 C.F.R. 328.3(a)(3), qualify as wetlands under 33 C.F.R. 328.3(b). The court of appeals reversed and remanded. Pet. App. A1-A14. It unanimously concluded that the wetlands on the southern part of the property are within the Corps' jurisdiction under the CWA, Pet. App. A6-A8, A13, and petitioner does not challenge that holding here.

The court of appeals also ruled that the district court had erred in holding that the crystallizers and pits are excluded from the category of "other waters" covered by the regulations on the ground that they are of artificial origin and are dry for part of the year. *Id.* at A9-A11. In the court's view, the Commerce Clause, and thus the CWA, are "broad enough to extend the Corps' jurisdiction to local

waters which may provide habitat to migratory birds and endangered species." *Id.* at A12. The court pointed out, however, that the property must "still have sufficient connections to interstate commerce" to come within the Corps' jurisdiction as defined in 33 C.F.R. 328.3(a)(3), and it remanded for a determination on that issue. Pet. App. A11-A12.[7]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. See note 14, *infra*. Review by this Court is unwarranted for these reasons alone. But in addition, the decision below is interlocutory. The court of appeals merely rejected the district court's reasoning for excluding the waters at issue here from coverage under Section 404 and remanded the case to the district court for further proceedings to determine whether some or all of those waters fall within the Corps of Engineers' Section 404 jurisdiction, as described in the Corps' regulations. There accordingly has been no final determination by the courts below that the waters at issue are covered by Section 404. The proceedings on remand would considerably sharpen the issues by allowing for development of the evidence and findings

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[7] Judge Rymer dissented on this aspect of the case. She was of the view that the crystallizers and calcium chloride pits do not fall within the category of "other waters" within the meaning of the Corps' regulations because the record did not show that water flows directly or indirectly into another body of water. Pet. App. A13. She therefore found it unnecessary to reach the question whether the Corps has jurisdiction under the CWA over waters that are not adjacent to bodies of water. *Ibid.*

concerning the application of the Corps' regulations to land having the particular (and atypical) features involved here. The question petitioner seeks to present therefore is not ripe for review in the context of this case. Nor is it ripe for review from a broader perspective, since no other court of appeals has yet addressed the substantive question of the Corps' jurisdiction in circumstances such as these. The petition for a writ of certiorari therefore should be denied.

1. In *Riverside Bayview Homes*, the Court upheld the Corps' interpretation of the term "waters" to encompass wetlands adjacent to navigable waters and their tributaries, in light of "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems." 474 U.S. at 133. In that case, the court of appeals had ruled that certain wetlands were not covered by the CWA because their aquatic characteristics were not the result of frequent flooding by navigable waters. See *id.* at 125. This Court disagreed, finding it "clear that the term 'navigable' as used in the Act is of limited import." *Id.* at 133.[8]

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[8] In reaching this conclusion, the Court cited (474 U.S. at 133) the Conference Report, which stated that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). The Court also cited (474 U.S. at 133) the views of Representative Dingell, who, commenting on the conference bill, stated that the new and broader definition "means all 'the waters of the United States' in a geographical sense. It does not mean 'navigable

Petitioner resurrects the discredited navigability limitation in a slightly different guise. It contends (Pet. 16) that Congress meant to embrace only waters "that could be reached under its Commerce Clause *power to regulate water commerce*, i.e., navigable waters, actual and potential, together with their 'adjuncts,'" that is, wetlands adjacent to navigable waters. Petitioner reasons that the power to regulate water commerce, and hence the CWA, cannot extend to bodies of water that are "isolated" from navigable waterways.[9] But *Riverside Bayview Homes* makes clear that Congress in the CWA invoked much more than its power to regulate water commerce:

> Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."

474 U.S. at 132-133 (quoting S. Rep. No. 414, 92d Cong., 2d Sess. 77 (1972)). Congress understood

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waters of the United States' in the technical sense as we sometime see in some laws." 118 Cong. Rec. 33,756-33,757 (1972).

[9] This category of waters is "isolated" from navigable waters only in the technical sense that there is no surface hydrological connection with such waters. Other important connections may nevertheless exist. For instance, "isolated" prairie potholes in the upper midwest play an important role in preventing flooding of navigable rivers. See note 16, *infra*. The "isolated" waters that are the focus of this case are located on a parcel that is partially subject to tidal inundation by San Francisco Bay. Pet. App. A3. Although the crystallizers and pits themselves may not be hydrologically connected with the Bay, they could reasonably be regarded as part of the same ecosystem.

that concepts of navigability have nothing to do with protecting aquatic ecosystems, and that the Act's purposes require a scientific and functional interpretation of "waters of the United States" that is directly tied to the aquatic values that Congress sought to protect.

One of those aquatic values is the continuing ability of waters of the United States to "provide[] for the protection and propagation of fish, shellfish, and wildlife." § 101(a)(2), 33 U.S.C. 1251(a)(2). Petitioner's assertion (Pet. 11-12) that Congress was indifferent to wildlife when it enacted the CWA is flatly contradicted by this statutory language. Congress also mandated that the Corps consider wildlife in evaluating permit applications: Section 404(b) of the Act, 33 U.S.C. 1344(b), directs the Corps to evaluate permit applications under guidelines developed by EPA in conjunction with the Corps. Those guidelines must take into account, *inter alia*, the effect of discharges of dredged or fill material on fish, shellfish, and wildlife, as well as changes in aquatic ecosystem diversity, productivity, and stability. §§ 403(c)(1) and 404(b)(1), 33 U.S.C. 1343(c)(1) and 1344(b)(1).[10] In addition, EPA may veto or restrict the use of any site for the disposal of dredged or fill material when it determines that a discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and

[10] EPA has published the required guidelines at 40 C.F.R. Pt. 230. The guidelines recognize that "[t]he discharge of dredged or fill material can result in the loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem." 40 C.F.R. 230.32(b).

breeding areas), wildlife, or recreational areas." § 404(c), 33 U.S.C. 1344(c). This Court recognized these significant goals of the CWA in *Riverside Bayview Homes* when it characterized the purpose of the Act as the "[p]rotection of aquatic ecosystems." 474 U.S. at 132.

Petitioner does not dispute that Congress's power under the Commerce Clause to control water pollution extends well beyond navigable waters. Cf. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981).[11] Petitioner's argument that Congress in the CWA nevertheless declined to invoke its full powers under the Commerce Clause to restore the health of the Nation's waters is unsupported by statutory text or legislative history. For example, petitioner cites nothing to support its speculation (Pet. 14 & n.14) that Congress was concerned about the Fifth Amendment takings implications of invoking its full Commerce Clause powers in this setting. Petitioner's position also conflicts with

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[11] In *Virginia Surface Mining*, the Court cited *United States* v. *Byrd*, 609 F.2d 1204 (1979), with approval. The Seventh Circuit held in *Byrd* that the Corps' assertion of Section 404 jurisdiction over wetlands adjacent to an intrastate lake was a constitutional exercise of power (and was consistent with congressional intent), because "filling activities, although they are local, have the potential for exerting a substantial economic effect on interstate commerce by an easily traced chain of causation." 609 F.2d at 1210. The court recognized that the effect of such localized filling activities would be to degrade the water quality of the lake they adjoined, which would, in turn, affect interstate commerce through its impact on the lake's value for recreation, fish, and wildlife. *Ibid.* See also *Utah* v. *Marsh*, 740 F.2d 799, 803-804 (10th Cir. 1984). These cases confirm that Congress's goal in the CWA was protection of aquatic ecosystems, not protection of water commerce, and that Congress accordingly invoked its full powers to protect those ecosystems.

a host of cases concluding that Congress intended fully to exercise its Commerce Clause powers, unlimited by traditional concepts of navigability. See, *e.g.*, *United States* v. *Huebner*, 752 F.2d 1235, 1239, 1240-1241 & n.9 (7th Cir.), cert. denied, 474 U.S. 817 (1985); *Utah* v. *Marsh*, 740 F.2d 799, 802-804 (10th Cir. 1984); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 914-916 (5th Cir. 1983); *United States* v. *Lambert*, 695 F.2d 536, 538 (11th Cir. 1983); *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 374-375 (10th Cir. 1979); *United States* v. *Byrd*, 609 F.2d 1204, 1209-1211 (7th Cir. 1979); *Leslie Salt Co.* v. *Froehlke*, 578 F.2d 742, 754-756 (9th Cir. 1978); cf. *Consolidation Coal Co.* v. *Costle*, 604 F.2d 239, 243 (4th Cir. 1979).[12]

2. Whatever doubt might once have existed about the intended reach of the CWA over non-adjacent ("isolated") waters was laid to rest by the 1977 amendments to the Act. As this Court noted in *Riverside Bayview Homes*, 474 U.S. at 135, the Corps' broad assertion of authority over non-navigable waters in 1975 aroused some congressional opposition, which came to a head in 1977. As the Court recounted, critics of the Corps' program inserted a provision in the House bill that would have redefined "navigable waters" so as to limit the Corps' authority under Section 404 to waters navigable in fact and their adjacent wetlands that were periodically inundated by contiguous navigable waters. 474 U.S. at 136. The Senate bill did not redefine "navigable

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[12] Petitioner concedes (Pet. 11) that Congress was concerned with water purity in the CWA, but does not explain how that concern is consistent with petitioner's theory that Congress invoked only its power over water commerce and navigation.

waters," but "dealt with the perceived problem of overregulation by the Corps by exempting certain activities (primarily agricultural) from the permit requirement and by providing for assumption of some of the Corps' regulatory duties by federally approved state programs." *Ibid.* The 1977 Amendments, as ultimately enacted, followed the Senate approach. 474 U.S. at 137.

What is significant here is that Congress in 1977 fully realized that the Corps' regulations, particularly the Phase III portion of the program spelled out in 1975 (see note 3, *supra*), covered isolated waters. In the House, Representative Abdnor understood that under the regulations, "the Corps must regulate all waters—from the smallest to the largest, including isolated wetlands and lakes, intermittent streams, and prairie potholes." 123 Cong. Rec. 34,852 (1977) (extension of remarks).[13] Representatives who favored retaining the broad definition of jurisdiction under Section 404 pointed to the importance of protecting all waters and wetlands. Representative Lehman expressed the view that Section 404, as interpreted in the Corps' regulations, "is a key to the protection of drinking supplies, finfish and shellfish spawning grounds, wildlife nesting and breeding areas, and countless esthetic and recreation benefits." *Id.* at 10,415. In support of continued coverage of "inland wetlands," Representative Steers inserted a statement by the Chairman of the Council on Environmental Quality, which pointed

[13] Representative Wright complained that the regulations' coverage of intrastate waters used by interstate travelers meant that "if one is going to visit his Uncle Fred out in North Dakota and fish in a pond on his land, then that property would be subject to a permit." 123 Cong. Rec. 10,431 (1977).

out that "[w]etlands, better known by such names as swamps, bogs, marshes, potholes, wet meadows and river outflow land," provide flood control, water purification, and "essential habitat in the life cycle of many birds and fish." *Id.* at 30,994-30,995.

The Senate bill, as noted above, did not attempt to restrict the Corps' broad assertion of jurisdiction. The Senate Report explained (S. Rep. No. 370, 95th Cong., 1st Sess. 75 (1977)):

> The committee amendment does not redefine navigable waters. Instead, the committee amendment intends to assure continued protection of all the Nation's waters, but allows States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of the navigable waters outside the corps program in the so-called phase I waters. Under the committee amendment, the corps will continue to administer the section 404 permit program in all navigable waters for a discharge of dredge or fill material until the approval of a State program for phase 2 and 3 waters.

This passage demonstrates the Committee's understanding of the Corps' phased-in expansion of Section 404 jurisdiction in the 1975 regulations, which included isolated waters in Phase III. See note 3, *supra*. Instead of rejecting that approach, the Committee incorporated the existing regulatory scheme into the amendment authorizing partial delegation of the Section 404 program to the States. § 404(g), 33 U.S.C. 1344(g).

The Senators clearly understood what was at stake. Senator Bentsen opposed the committee bill because it (123 Cong. Rec. 26,711 (1977))—

> skirts the fundamental problem: the definition of Federal jurisdiction in the regulation of dredge and fill activities. The program would still cover all waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies.

Senator Tower similarly objected to affirming the Corps' regulatory scheme, "which," he said, "covers not just the rivers of the Nation but all surface waters and wetlands of the United States." *Id.* at 26,722. On the other hand, Senator Stafford argued that it was unnecessary to narrow the definition of "waters" because the Senate bill "insures continued protection of the Nation's waters, but allows States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes and similar areas that lie outside the corps program in the so-called 'Phase I waters.'" *Id.* at 26,714.

As this Court observed in *Riverside Bayview Homes*, the Conference Committee adopted the Senate approach and "efforts to narrow the definition of 'waters' were abandoned." 474 U.S. at 137. Congress determined that the Corps would continue to have jurisdiction over Phase III isolated waters, although that authority could now be delegated to the States; in addition, exemptions for activities such as the construction of stock ponds and sedimentation basins were created. S. Conf. Rep. No. 830, 95th Cong., 1st Sess. 100-101 (1977). As Senator Baker explained (123 Cong. Rec. 39,209 (1977) (emphasis added)):

> [T]he conference bill retains the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act to control pollution to the fullest constitutional

> extent. A permit program will continue to regulate dredged or fill material discharged into *all* our Nation's waters.

In sum, Congress's refusal to overrule the Corps' construction of the CWA as extending to Phase III isolated waters shows the reasonableness of that construction, particularly because it was "brought to Congress' attention through legislation specifically designed to supplant it." *Riverside Bayview Homes*, 474 U.S. at 137 (citing *Bob Jones University* v. *United States*, 461 U.S. 574, 599-601 (1983), and *United States* v. *Rutherford*, 442 U.S. 544, 554 & n.10 (1979)).

3. In *Riverside Bayview Homes*, the Court found it appropriate to give deference to the interpretation by the Corps of Engineers and EPA that adjacent wetlands are covered by the CWA, "[i]n view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters." 474 U.S. at 131, 134. Petitioner has not explained why deference is not equally appropriate with respect to the agencies' interpretation that non-adjacent ("isolated") waters, the destruction of which could affect interstate or foreign commerce (such as by eliminating the habitat of migratory birds), are also "waters of the United States" covered by the Act. As we have shown, Congress meant to invoke the full extent of its Commerce Clause powers to protect the Nation's waters for the benefit of humans and wildlife, and realized the importance of isolated waters in this endeavor. Hence, the agencies cannot be accused of extending jurisdiction beyond what Congress intended.

Petitioner contends (Pet. 18-20) that deference is unwarranted because what it terms the "novel no-

tion" of considering migratory-bird use as a sufficient nexus to interstate commerce was not "born" until oversight hearings before a Senate Subcommittee in 1985. In fact, the record of those hearings makes clear that the agencies had been basing jurisdiction over isolated waters on migratory-bird use (among other factors) all along.[14] At issue in 1985 was the *manner* in which the Corps had been exercising that jurisdiction—specifically, by requiring that there be evidence of actual (and in some cases extensive) use by migratory birds. *Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 122-123 (1985) [hereinafter *Hearings*]. The Acting Assistant Secretary of the Army for Civil Works made clear that "the Corps of Engineers generally does accept the notion that migratory waterfowl [use] does constitute a nexus with interstate commerce." *Id.* at 168. The question was simply "the extent of use by migratory fowl." *Id.* at 115; see also *id.* at 123 (the question is "how many ducks"). The participants at the hearing recognized that the Corps had successfully asserted jurisdiction over an intrastate body of water in part on the basis of migratory-bird use in *Utah* v. *Marsh*, *supra*. *Hearings* 114, 121, 208. The Assistant Secretary assured the subcommittee that "[t]he Corps has been making jurisdictional determinations on isolated wetlands in the same way since publication of our 1977 regulations," and that a particularly controversial decision not to exercise jurisdiction over

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[14] The Commerce Clause power extends to the protection of migratory birds. *Missouri* v. *Holland*, 252 U.S. 416, 435 (1920); *Andrus* v. *Allard*, 444 U.S. 51, 63 n.19 (1979).

a pond in Texas was simply based on the fact that use by migratory birds in that instance was "trivial." *Id.* at 210-211; see also *id.* at 116. Hence, there is no merit to petitioner's contention that the agencies' interpretation with respect to migratory birds is of recent vintage.[15]

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[15] One development that did stem from the 1985 oversight hearings was a commitment by EPA and the Corps of Engineers to implement the regulations more fully by considering potential, as well as actual, use of isolated waters by migratory birds as a sufficient nexus to interstate commerce. *Id.* at 167-171. The Corps subsequently sent guidance to its field offices listing, *inter alia*, actual and potential usage by migratory birds as sufficient links to interstate commerce. In *Tabb Lakes, Ltd.* v. *United States*, 715 F. Supp. 726 (E.D. Va. 1988), aff'd, 885 F.2d 866 (4th Cir. 1989) (table), the district court held that this guidance was procedurally defective because, in the court's view, it constituted a substantive rule that could not be promulgated without notice and opportunity for comment. The court expressly did not reach the question of the validity, as a substantive matter, of the Corps' assertion of jurisdiction in circumstances covered by the challenged guidance memorandum. 715 F.2d at 729. Although the United States disagreed with the district court's procedural ruling in *Tabb Lakes*, we did not seek review in this Court of the Fourth Circuit's unpublished affirmance of that ruling; instead the agencies have decided to institute rulemaking proceedings on the question of their jurisdiction over isolated waters. Pet. App. A48.

Contrary to petitioner's suggestion (Pet. 20-21), there is no conflict between *Tabb Lakes* and the decision below. Because petitioner has never challenged the procedural validity of the Corps' guidance regarding migratory birds, the courts below did not consider the issue decided in *Tabb Lakes*; conversely, as just noted, *Tabb Lakes* did not decide the question, at issue here, of the validity as a substantive matter of the Corps' assertion of jurisdiction over non-adjacent waters, based on the effect on migratory birds. Presumably for this reason, and because it did not mount a procedural challenge to

4. In this case, it remains to be determined on remand whether the non-adjacent waters at issue have a sufficient nexus to interstate commerce to support jurisdiction under the regulations of the Corps of Engineers and EPA. See Pet. App. A12 (remanding to "determine if the property has the requisite connections to interstate commerce"). For this reason, even if the validity of the regulation defining the Corps' jurisdiction to include isolated waters otherwise warranted review, it would be premature to consider that issue here, where the applicability of the challenged regulation has not yet been decided. The district court did not reach the question, posed by petitioner in this Court, of whether the regulations may properly reach isolated waters based on their use by migratory birds. The court of appeals majority addressed that question somewhat obliquely in a single sentence, *id.* at A12, and Judge Rymer, in dissent, found it unnecessary to reach the issue. *Id.* at A13. The remand to the district court (and possible further review by the court of appeals) would further illuminate the character of the waters and their use by migratory birds, and the proceedings on remand might also greatly clarify the interests at stake in this and similar cases and the precise application of the Corps' regulations in this setting. It also might moot this case. Hence, review of the legal issue that petitioner seeks to raise at this interlocutory stage of the case would be premature.

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the Corps' guidance regarding migratory birds, petitioner in fact does not urge review based on a supposed circuit conflict. Instead, while "noting" what it (erroneously) characterizes as a conflict of decisions on the procedural issue, petitioner explicitly "press[es]" only the "substantive" question of whether the CWA authorizes the Corps to regulate waters based on their use by migratory birds. See Pet. 7.

The legal issue likewise is not ripe for review from a broader perspective. No other court has rendered a definitive decision on the validity of the Corps' assertion of jurisdiction in circumstances such as these. See note 15, *supra*. Petitioner nonetheless asserts (Pet. 8) that review is warranted on account of the allegedly "far-reaching consequences" of the decision below. It is, of course, difficult to predict, prior to the proceedings on remand, what the precedential and other impact of the decision below might eventually be, since there has been no definitive ruling in this case that some or all of the waters in issue are covered by Section 404. It is safe to say, however, that petitioner's prediction (Pet. 8) that "tens of millions" of acres will be affected is quite wide of the mark. As petitioner has chosen to frame it (Pet. i, 7 n.9, 8), the question presented by this case involves isolated waters whose only link to interstate commerce is the presence of migratory birds or endangered species. Many isolated waters will have other links to interstate commerce. For instance, prairie potholes play a vital role in preventing flooding of navigable waterways.[16] They also attract hunters, birdwatchers and other interstate travelers.[17] Indeed, cases in which the only connection to inter-

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[16] See Hubbard & Linder, *Spring Runoff Retention in Prairie Pothole Wetlands*, 1986 J. Soil & Water Conservation 122; see also U.S. Fish and Wildlife Service, *Wetlands of the United States: Current Status and Recent Trends* 22-23, 43 (1984) ("drainage eliminates the flood storage value of pothole depressions, thereby increasing flooding problems as in the James River basin of North Dakota").

[17] Wetlands of the United States, *supra*, at 24-25 ("[i]n 1980, 5.3 million people spent $638 million on hunting waterfowl and other migratory birds").

state commerce is use by migratory birds have been rare, and this appears to be the only reported decision squarely to address the issue of whether the Corps has jurisdiction in such circumstances.

Petitioner's contention (Pet. 23) that the decision below will have "enormous consequences" likewise is unfounded. The only question here is whether the CWA authorizes the Corps to assert regulatory *jurisdiction* over isolated waters—and more particularly, whether it authorizes the Corps to assert jurisdiction based on use of the waters by migratory birds. Petitioner's challenge to the Corps' threshold jurisdiction even to consider the effect of particular fill projects on such waters would, if accepted, pretermit the permit review process that Congress prescribed to ensure that waters are not destroyed without a prior assessment of the ecological importance of the particular waters and the impacts of the proposed activity on them. Where waters covered by the Corps' definition are "lacking in importance to the aquatic environment—or where [their] importance is outweighed by other values—the Corps may always allow development * * * simply by issuing a permit." *Riverside Bayview Homes*, 474 U.S. at 135 n.9. Furthermore, the Corps has issued a "nationwide permit" that, in most cases, allows filling of up to ten acres of isolated waters without an individual permit. 33 C.F.R. 330.5(a)(26). It is thus not clear at this point that petitioner will be denied permission to develop its land or significantly limited in the manner in which it may do so. Petitioner's speculations regarding the impact of the decision below therefore do not furnish a basis for review. Cf. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186-194 (1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

ROBERT L. KLARQUIST
DAVID C. SHILTON
Attorneys

JANUARY 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20312